STATE OF MICHIGAN

COURT OF APPEALS

ERIC CARLYLE DEAN and ELIZABETH DEAN, Plaintiffs-Appellants, v CITY OF BAY CITY, ROBERT V. BELLEMAN, JAMES PALENICK, PHILIP NEWTON and ROBERT KATT, Defendants-Appellees.	UNPUBLISHED May 21, 2009 No. 281847 Bay Circuit Court LC No. 06-003039-CD

Before: Borrello, P.J., and Murphy and M.J. Kelly, JJ.

PER CURIAM.

In this wrongful termination case, plaintiff Eric Carlyle Dean appeals as of right the trial court order dismissing his claims for wrongful discharge and breach of contract, as well as Elizabeth Dean's claim for loss of consortium,[1] against defendants City of Bay City, Robert V. Belleman, Philip Newton and Robert Katt.[2] We affirm.

I. Facts and Procedural History

This case arises as a result of plaintiff's termination from his employment as the Director of Power and Technology for the City of Bay City. Defendant James Palenick, then the city manager for Bay City, hired plaintiff on July 10, 2000. Palenick became dissatisfied with plaintiff's job performance. In July 2002, Palenick evaluated plaintiff and concluded that his performance was unsatisfactory. Plaintiff's score on the evaluation was negative six out of a possible 33 points. Palenick made numerous negative comments regarding plaintiff's job performance in the evaluation[3] and recommended that plaintiff's employment be terminated

[1] Because Elizabeth Dean's claim for loss of consortium is a derivative action, this opinion will refer to Eric Carlyle Dean as "plaintiff."

[2] Plaintiff's claims against defendant James Palenick were dismissed in a separate order dated July 24, 2007.

[3] Some of the negative comments in defendant Palenick's evaluation of plaintiff's job (continued…)

immediately. However, before he could fire plaintiff, Palenick himself was terminated by the city commission in August 2002.

The same month, defendant Belleman, the assistant city manager, was named acting city manager. In spite of plaintiff's poor evaluation, Belleman did not immediately terminate plaintiff. However, defendant Belleman quickly became concerned about plaintiff's job performance, and in November 2002, he presented plaintiff with 26 questions to which he sought responses from plaintiff to assist him in completing his own evaluation of plaintiff. Thereafter, on November 21, 2003, Belleman completed his evaluation of plaintiff's job performance, and the result was even more negative than defendant Palenick's evaluation of plaintiff's

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(…continued)

performance include:

> Job Knowledge-"appears to profess knowledge, but results bely [sic] such professions"
>
> Communication-"is singularly self-serving in his zeal to undermine the city Manager & elevate himself"
>
> Supervisory Ability-"employees . . . have . . . expressed total disgust & lack of confidence"
>
> Adaptability/Problem-Solving Skills-"has mismanaged power contract, budget, employee relations, colleague relations, and will not work as team player"
>
> Quantity and Dependability of Effort-"appears to lack direction and focus works limited hours flits from one task to the next without closure or success"
>
> Initiative/Personal Drive-"is clearly Motivated—quite often for the wrong ends. (personal Aggrandizement)"
>
> Quality and Effectivess of Effort-"has potential, but seldom fulfills it"
>
> Decision Making Skills-"Abysmal. One disaster after another—putting City at Liability unnecessarily"
>
> Budgeting and Cost control-"Electric Fund in poorest financial shape in 2 decades—poor Decisions, poor Management"
>
> Co-Operation/Sensitivity-"A singular low point. A classic 'back-stabber' & consummate self-promoter"
>
> Attendance/Availability-"very limited work hours potential reflection of a substance abuse problem"

performance. Plaintiff's score was negative nine out of a possible 33 points. The evaluation was extraordinarily detailed, providing numerous specific instances of plaintiff's deficiencies in his job performance in all of the categories on the evaluation form.

The evaluation referred to plaintiff's handling of a contract between defendant city and CMS Wholesale Power Sales for the purchase of wholesale electricity and asserted that plaintiff used an "unethical approach to break contract with CMS by demanding performance bond" even though plaintiff "knew CMS was not in a position to issue a performance bond[.]" Evidence revealed that plaintiff advised defendant city regarding this contract in a manner that was at best simply incorrect or at worst deliberately misleading and that cost the city money. At a city commission finance and policy committee meeting in April 2001, plaintiff advised that the agreement would require defendant city's costs to generate electricity to increase by three percent. In fact, however, there was actually a 17 or 20 percent increase in the price of wholesale power. The evaluation noted plaintiff's failings in advising the city commission in this regard. In addition, plaintiff did not negotiate a "time of day" rate in the agreement with CMS, and he admitted that this negatively impacted the electric utility's profitability. He stated that CMS agreed to continue negotiating a "time of day" rate after the contract was in place. In an effort to break the city's contract with CMS, plaintiff accused CMS of inflating electric rates by engaging in round-trip trading at the time it negotiated its contract with defendant city and artificially driving up the city's costs. According to a June 5, 2002, newspaper article in the Bay City Times, "[t]he practice [of round-trip trading] . . . is not illegal . . . [and] involves buying power from other energy companies and selling it back at the same price. It results in artificially high trading volume and inflated revenue." After plaintiff advised the city commission to reserve $250,000 for the purpose of challenging the city's power contract with CMS, CMS refused to continue negotiations regarding a "time of day" rate.

The evaluation further asserted that plaintiff "lied three times to the City Commission" and referred to a lie plaintiff told "the City Commission about why we were hiring a consultant to identify an alternate power source." In fact, on May 28, 2003, plaintiff received a disciplinary notice for making misrepresentations to the mayor and city commission. The disciplinary notice was signed by defendant Belleman and stated:

> I met with [plaintiff] on May 28, 2003 to review and discuss his inaccurate and misleading statement to the Mayor and City Commission as stated in the Commission cover recommendation on April 7, 2003 pertaining to the request for a Professional Services Agreement with Alliant Energy Integrated Services for investigation of alternate power suppliers. [Plaintiff] submitted this request originally on March 17, 2003. I requested it be withdrawn because City Commissioners demanded an explanation as to why this was needed and [plaintiff] was unable to provide an adequate explanation. Subsequently, [plaintiff] informed me that these services were no longer needed and that he submitted this action item to the City Commission because I wanted it submitted. I explained to [plaintiff] that all I asked for was an update on where this issue stood since he had informed the City Attorney and I that this service was imperative because of CMS' alleged financial woes. After our discussion, [plaintiff] modified the cover recommendation to claim the reason we no longer needed this service was because we were just made aware of CPS' effort to buy

> the City's Purchase Power Agreement from CMS. However, [plaintiff] knew of CMS' efforts in February, 2003.

As the evaluation stated, plaintiff was suspended for two days as a result of this disciplinary notice.

The evaluation also cited plaintiff's "track record of violating the City's Purchasing Ordinance—constantly submitting emergency purchases and submitting purchase orders to Purchasing after the fact[.]" On July 11, 2002, Chris Ball, Director of Fiscal Services for defendant city, wrote plaintiff a memorandum regarding plaintiff's non-compliance with the city's purchasing policies. The memorandum admonished plaintiff for violating the policy requiring a purchase order for any purchase over $500. In the memorandum, Ball wrote that plaintiff's "department treats Purchasing as a hindrance, and ignores purchasing policies that other City Departments have no problem adhering to. I can only conclude this as a clear attempt to evade the purchasing policy, and insult the intelligence of the Purchasing Department."

The evaluation was also critical of plaintiff's handling of several power outages in the city in 2002. There was evidence that after the power outages, plaintiff began a comprehensive power line or circuit inspection program that was at least partially unnecessary because the cause of the outages was known to be a squirrel in one case and lightning in the other cases. These inspections resulted in large amounts of overtime for city workers and ultimately cost the city about $170,000. According to the evaluation, plaintiff's "approach is unusual, created undue exposure to the City, and made unnecessary upgrades. This program resulted in the purchase of unnecessary equipment and incurred excessive overtime." In a newspaper article that appeared in the Bay City Times on June 24, 2002, plaintiff accepted responsibility for the power outages, stating that the outages were his fault and that it would be his fault if the city continued to experience such outages. In response to the newspaper article, Mark A. Kolka, the city attorney, penned a letter to plaintiff chastising plaintiff for exposing the city to potentially significant financial liability by making unauthorized statements and admissions of liability in the article. In the letter, Kolka stated:

> Your unauthorized statements and admissions are extremely detrimental and irresponsible, particularly from an individual who should know better and should have consulted legal counsel, the risk manager and City Manager <u>prior to</u> making any statement or admission of such magnitude or giving press interviews on a matter which may result in significant financial exposure to the City.

Kolka instructed plaintiff to cease making any statements or engaging in interviews concerning the power outages and to consult with the city's risk manager and attorney before making such statements in the future.

The evaluation also referred to plaintiff's poor handling of a deal he made to bring electricity to a new Menards store in Bay City. The details concerning this arrangement are not entirely clear from the record, but plaintiff apparently told Menards representatives that defendant city would install electrical service for the company free of charge. According to plaintiff, the city's rules and regulations permitted him to make such a deal for large commercial or industrial facilities provided that the city would recover the installation costs within a three-year period. The original price for the purchase of aluminum cable to service Menards was

$29,604, but it was calculated incorrectly, and the actual costs for the cable was $78,670.16, an increase of $49,066.16. Plaintiff accepted responsibility for this error at a finance and policy committee meeting on September 9, 2002. The evaluation cites plaintiff's inability "to accurately calculate, analyze, and clearly communicate the financial cost of providing service to new customers" like Mendards. Another problem with the Menards deal was that the contract between defendant city and Menards was for ten years, but plaintiff acknowledged in his deposition that it would actually take close to 20 years for the city to recover the costs of installation.

Defendant Belleman and plaintiff met to discuss the evaluation. In a letter dated November 24, 2003, defendant Belleman terminated plaintiff's employment. In the letter, Belleman stated that "termination was based upon the reasons set forth in your evaluation, our numerous discussions concerning your job performance and the electric utility's unprofitability." Under plaintiff's leadership, the electric utility lost money on annual operations for the first time in years. In previous years, the utility would typically make around $4 million in profits. However, under plaintiff's leadership, the electric utility had a $1.3 million shortfall, which forced the city commission to balance the electric utility budget by raising electric rates by ten percent or taking $1.3 million from the utility's reserve fund. Rather than raising electric rates, defendant city decided to take the money from the reserve fund.

In addition to the aforementioned problems and mistakes during plaintiff's tenure as Director of Power and Technology, there was evidence that plaintiff had some medical issues and potential alcohol and prescription medication abuse problems[4] during this time. Plaintiff admitted during a deposition that he occasionally attends Alcoholics Anonymous meetings and that he had a drinking problem when he began working for defendant city. He first noticed that he had an alcohol problem when he was divorced in 1986 or 1987. At that time, he went to a 30-day inpatient treatment facility. On November 28, 2002, plaintiff was arrested for operating a vehicle under the influence of intoxicating liquor. He claimed that he quit drinking alcohol on his own when he realized "that its use in any form, fashion, under any form of justification or anything left you in worse shape than it did if you just leave it alone."

In 2001, plaintiff had gastric bypass surgery. Part of plaintiff's motivation in having the surgery was that the surgery would render him physiologically unable to drink alcohol in that if he drank after the surgery, he would vomit or become super-intoxicated. The surgery did not have this effect, however. After the surgery, his surgical wound did not heal well and became infected, and plaintiff was "on a plethora of pain medications; Vicodins, Oxycontins, Duragesic pain patches." He stated that he took pain medications from the time he returned to work after his surgery until a couple of months before his termination. According to plaintiff's medical

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[4] Although defendants assert that they did not terminate plaintiff's employment because of any substance abuse problems, and the record supports their assertion in this regard, this opinion includes facts regarding plaintiff's substance abuse issues because plaintiff claims that defendants violated the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, because they perceived that plaintiff was disabled because of his use of alcohol and prescription drugs.

records, plaintiff "had been taking 2 Vicodin extra strength 5 x a day. Surgeon will no longer refill it."

When plaintiff had a consultation with a doctor for foot pain, he indicated that he had been on pain medication since 1999. The consultation notes from this appointment state:

> The patient received Vicodin 7.5 mg up to five tablets a day. Never had tried Fentanyl patch or similar medication. When we checked with the pharmacy about the patient's prescriptions, we found out that he received prescriptions from different physicians. However one of them was an Emergency Room physician and the other was the ophthalmic surgeon from University of Michigan Hospital who performed laser surgery for his eye. The patient states he was not aware of the rules of informing the primary care physician when he receives a prescription from another source.

The doctor wrote a prescription for ten fentanyl patches to control plaintiff's foot pain.

Plaintiff's medical records indicate that in September 2002, he was taken to the Bay Medical Center emergency department after his wife discovered him in a chair in their home. He was "having difficulty breathing" and he subsequently "stopped breathing and turned blue." Plaintiff told physicians that "he cut fentanyl packs open and drank the contents of each pack." The diagnosis was "[r]espiratory failure" and "[a]cute overdose of fentanyl." Plaintiff's medical records indicate that plaintiff overdosed again in April 2003. His chief complaint to medical personnel was "possible overdose." Plaintiff was missing five Oxycontin pills from a prescription that he started that day for a fractured hip. The diagnosis was "[o]piate overdose."

Following his termination as Director of Power and Technology for defendant city, plaintiff originally filed suit in federal court in May 2004. The United States District Court for the Eastern District of Michigan dismissed plaintiff's federal claims and declined to retain supplemental jurisdiction of plaintiff's state claims and dismissed the state claims without prejudice. The United States Court of Appeals for the Sixth Circuit affirmed. Thereafter, on January 12, 2006, plaintiff filed a 16-count complaint containing both federal and state law claims against defendants in Bay Circuit Court. The complaint included claims for violation of the Due Process Clauses of both the United States and Michigan Constitutions, retaliatory discharge in violation of the First and Fourteenth Amendments to the United States Constitution and Const 1963, art 1, § 5, breach of contract, wrongful discharge, tortious interference with business relationship (Palenick), defamation (Bay City, Palenick and Belleman), invasion of privacy (Bay City, Palenick and Belleman), intentional infliction of emotional distress (all defendants), violation of the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., violation of Michigan's Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., loss of consortium and for enforcement of the Freedom of Information Act.

The action was removed to federal district court based on federal question jurisdiction. The parties stipulated to dismiss plaintiff's federal claims with prejudice, and the federal district court remanded the matter to Bay Circuit Court for resolution of plaintiff's state law claims. Ultimately, the trial court dismissed all of plaintiff's state law claims against defendants.

II. Standard of Review

A trial court may grant a motion for summary disposition under MCR 2.116(C)(7) when a party is barred from raising a claim because of the effect of a prior judgment, such as collateral estoppel. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). Application of a preclusion doctrine is a question of law that this Court reviews de novo. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000). The applicability of governmental immunity is also a question of law that this Court reviews de novo. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). This Court also reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). In deciding a motion brought pursuant to MCR 2.116(C)(7), a court should consider all affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If the pleadings or documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Holmes*, *supra* at 706.

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

III. Analysis

A. Breach of Contract/Wrongful Termination[5]

[5] Although plaintiff pleaded these claims as separate claims, the trial court and parties treated (continued…)

Plaintiff first argues that the trial court erred in finding defendants had just cause to terminate his employment and in granting summary disposition of his breach of contract claim.

Although defendants dispute in their brief on appeal that plaintiff was a just cause employee, they do not present any legal argument to support the conclusion that plaintiff was an at will employee. Furthermore, the Federal District Court for the Eastern District Of Michigan concluded, in deciding whether to dismiss plaintiff's federal due process claim, that plaintiff was a just cause employee. Thus, this opinion presumes that plaintiff could not be terminated absent just cause.

Generally the trier of fact decides whether the employee was discharged for cause. See *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 620-624; 292 NW2d 880 (1980). Without substituting its judgment for that of the employer, the jury generally may determine whether the employee actually committed the misconduct alleged by the employer. *Id.* at 621-622.

In this case, defendants presented substantial evidence that plaintiff was terminated for just cause. Specifically, defendants presented evidence that the electric utility lost money ($1.3 million) and was not profitable for the first time in years under plaintiff's leadership, that plaintiff failed to comply with defendant city's purchasing policies, that plaintiff inaccurately advised defendant city regarding a contract for the purchase of wholesale electricity from CMS Wholesale Power Sales and acted unethically regarding the contract, that defendant failed to negotiate a "time of day" rate in the contract and that this contract cost the city money, that plaintiff was suspended for two days for making inaccurate and misleading statements to the mayor and city commission, that plaintiff handled several power outages in the city in 2002 poorly by beginning a comprehensive inspection program that was very expensive to the city and that was excessive because the cause of the power outages was known and by exposing defendant city to liability by admitting in a newspaper article that he was at fault for the outages.

Because defendants, as the moving party, supported their motion for summary disposition with an abundance of documentary evidence, plaintiff, as the party opposing the motion, could not merely rest on the allegations or denials in his pleadings, but was required to demonstrate with supporting evidence that a genuine and material issue of fact existed. MCR 2.116(G)(4); *Reed v Reed*, 265 Mich App 131, 140-141; 693 NW2d 825 (2005); *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992). If the party opposing summary disposition does not so respond, summary judgment may be entered against him. MCR 2.116(G)(4); *Kamalnath*, *supra* at 553. "[T]he mere possibility that the claim might be supported by evidence produced at trial . . . is insufficient under our court rules." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

The trial court initially denied defendants' motion to dismiss plaintiff's breach of contract claim. At a July 3, 2007, hearing on the parties' motions for summary disposition, the trial court repeatedly asked plaintiff to specifically indicate upon what documentary evidence plaintiff was relying on in asserting that defendants did not have just cause to terminate him, and plaintiff was

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them as essentially the same claim for summary disposition purposes.

unable to do so. At one point, counsel for plaintiff responded, "It's a fact question, Judge. These are very complex issues . . . that would require a significant amount of evidence . . . and we could meet this at trial . . . ." As the trial court correctly noted on the record, it was not enough for plaintiff to produce such evidence at trial. "A mere promise to offer factual support at trial is insufficient." *Kamalnath*, *supra* at 553. Despite plaintiff's inability to cite specific facts and evidence to establish an issue of material fact, the trial court took the motion under advisement and did not dismiss plaintiff's wrongful termination claim at that time. After plaintiff was again unable to cite specific facts and specific evidence at an October 12, 2007, hearing, despite the trial court repeatedly imploring plaintiff to point to specific evidence, the trial court dismissed plaintiff's breach of contract and wrongful discharge claims in an order dated October 24, 2007.

The trial court was correct in concluding that plaintiff failed to refute defendants' documentary evidence. Plaintiff wrote a brief opposing defendants city, Belleman, Newton and Katt's motion for summary disposition and a separate brief opposing defendant Palenick's motion for summary disposition. Plaintiff attached to both briefs a significant amount of documentary evidence. However, this evidence does not establish an issue of material fact regarding whether defendants had just cause to terminate plaintiff's employment. The trial court therefore properly dismissed his claim on this basis.

Plaintiff argues that defendants' proffered reasons for terminating him were pretextual and that the true reasons for plaintiff's termination were politics and personal animus,[6] but plaintiff failed to establish a genuine issue of material fact in this regard. In his brief on appeal, plaintiff asserts that "[t]he July 27, 2002 evaluation of [plaintiff] by Palenick was characterized as retaliatory" by city attorney Neil Wackerly and defendant Belleman. Even if defendant Palenick's evaluation was characterized by someone as "retaliatory," a fact which is not supported by the evidence that plaintiff cites, this fact is not material since defendant Belleman, not defendant Palenick, terminated plaintiff's employment. Moreover, it is significant that even though defendant Palenick recommended immediate termination in July 2002, defendant Belleman waited and did not terminate plaintiff immediately. Instead, defendant Belleman took time to form his own judgments about plaintiff's job performance, even submitting a list of 26 questions for plaintiff to answer to help him evaluate plaintiff's performance. Ultimately, defendant Belleman did not terminate plaintiff until November 2003, about 16 months after defendant Palenick recommended immediate termination due to poor performance. This fact contradicts plaintiff's claim that he was terminated for a political reason or because of defendant Palenick's personal animus.

Defendants presented substantial evidence that plaintiff was terminated for just cause, and plaintiff failed to present evidence to support his speculative arguments that he was terminated for political reasons or personal animus. Plaintiff has not alleged that defendant did not apply disciplinary policies in a consistent fashion or that other employees were not

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[6] Plaintiff also claims that the true reason for his termination was defendants' perception that he was disabled as a result of the use of drugs and alcohol. We address this argument *infra* in Section III C of this opinion.

terminated for engaging in the same or similar conduct. Because plaintiff failed to demonstrate with supporting evidence that a genuine issue of material fact existed regarding whether he was terminated for just cause, the trial court properly granted summary disposition of plaintiff's breach of contract and wrongful termination claims.

Plaintiff also argues that defendants did not have just cause to terminate him because they failed to follow the disciplinary procedures under Art 2, § § 2-3 and 2-3.1 and the grievance procedure under Section C of defendant city's employee handbook, which is known as the Brown Book. Plaintiff asserts that under Section C, he was entitled to have his termination reviewed by the city commission. Plaintiff cites this Court's opinion in *Damrow v Thumb Cooperative Terminal, Inc*, 126 Mich App 354, 365; 337 NW2d 338 (1983) for the proposition that an employer that does not follow the procedures in its employment manual governing discharge for unsatisfactory performance does not have just cause to terminate the employee.

Before November 18, 2002, section C of the Brown Book provided for an appeal of a grievance to the city commission, and there were no provisions regarding arbitration of grievances. However, on November 18, 2002, defendant city amended the grievance procedure. Plaintiff claims that he never received a copy of this policy and was not informed that the policy changed the terms of his employment. Among other changes, the amendment eliminated the right of a terminated employee to appeal to the city commission (appeal was now to the city manager), and added a provision that non-union employees (plaintiff was a non-union employee) whose employment was terminated could elect to submit the matter to arbitration.

The evidence shows that contrary to plaintiff's argument, plaintiff was aware of his right to arbitration and defendant city did not depart from the policies and procedures contained in the Brown Book. The amended grievance procedure gave employees with grievances an appeal to the city manager. At the time, defendant Belleman was acting city manger. In a letter to plaintiff from defendant Belleman, Belleman wrote: "[o]n December 8, 2003, a grievance hearing was held at [plaintiff's] request pursuant to the Grievance and Arbitration Procedures for Non-Union Employees." Furthermore, in the letter from defendant Belleman to plaintiff, Belleman informed plaintiff: "Attached herewith is an application for an American Arbitration Association Demand for Arbitration. You will be responsible for completing said application and processing it with the appropriate filing fee." Plaintiff acknowledged in his deposition that he withdrew his request for arbitration.

The evidence shows that unlike in *Damrow*, defendant employer in this case complied with its policies and procedures in its employee manual. Furthermore, the evidence refutes plaintiff's claim that he was not aware of his right to elect arbitration of his grievance regarding his termination. Plaintiff's argument regarding defendants' failure to follow the procedures in the Brown Book is therefore without merit.

B. Retaliatory Discharge

Plaintiff argues that the trial court erred in dismissing his state retaliatory discharge claim under the doctrine of res judicata based on the fact that the federal district court dismissed his federal retaliatory discharge claim.

Plaintiff's complaint contained two retaliatory discharge claims. Count III was a claim for "Retaliatory Discharge, Under Color of Law, In Violation of the First and Fourteenth Amendments to the United States Constitution." Count IV was a claim for "Retaliatory Discharge, Under Color of Law, In Violation of the Article I, Section 5 of the Michigan Constitution." Both of these claims asserted that plaintiff was discharged for engaging "in constitutionally protected speech on matters of public concern by communicating with the City Commission, elected and appointed office holders, news media, community leaders, and other organizations and individuals" and that as a result of his speech, he was terminated. The federal district court dismissed the claim for retaliatory discharge in violation of the First Amendment, finding that plaintiff had not met his burden to establish the presence of a genuine issue of material fact. *Dean v Bay City*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued December 30, 2005 (Docket No. 04-10120-BC), p 27. The language used in the First Amendment of the United States Constitution and the Michigan free speech clause are similar, and "[t]he rights to free speech under the Michigan and federal constitutions are coterminous." *Burns v Detroit (On Remand)*, 253 Mich App 608, 620-621; 660 NW2d 85 (2002), mod 468 Mich 881 (2003). Because the federal district court dismissed plaintiff's nearly identical federal claim for retaliatory discharge in violation of the First Amendment, the trial court dismissed plaintiff's state claim for retaliatory discharge in violation of Michigan's free speech clause under the doctrine of collateral estoppel.

Plaintiff argues that the trial court erred in dismissing plaintiff's state retaliatory discharge claim. However, plaintiff does not argue that the elements of collateral estoppel have not been satisfied. Rather, plaintiff argues that "[t]here is a separate cause of action for retaliatory discharge where the discharge is against public policy" and that the trial court should not have dismissed this claim. Plaintiff's state retaliatory discharge claim was clearly based solely on the right to free speech under the Michigan Constitution. This claim did not plead a claim for retaliatory discharge in violation of public policy. While plaintiff could have argued that his state retaliatory discharge claim based on Michigan's free speech clause was sufficient to satisfy MCR 2.111(B)(1) as to a claim for retaliatory discharge in violation of public policy, he has not done so. It is not the function of this Court to discover and rationalize the basis for a party's claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). To the extent that plaintiff has not presented any legal argument regarding the sufficiency of the complaint to inform defendants as to a claim for retaliatory discharge in violation of public policy, it is not preserved for appeal. Therefore, plaintiff's argument in this regard is without merit.

C. PWDCRA

Plaintiff argues that the trial court erred in granting summary disposition of his PWDCRA claim. According to plaintiff, summary disposition was improper because defendants perceived that plaintiff was disabled because of alcohol and drug abuse, and they terminated his employment on this basis.

At the outset, we observe that plaintiff, not defendants, insists that he was terminated because of his abuse of alcohol or prescription drugs. According to plaintiff, defendants have used plaintiff's substance abuse issues as a cover up because they didn't have just cause to terminate plaintiff. However, defendants argue that they had just cause to terminate plaintiff and

do not assert that plaintiff was terminated because of alcohol or drug abuse. Furthermore, none of the evidence indicates that plaintiff was terminated because of his use or abuse of alcohol or prescription drugs; to the contrary, all of the evidence actually establishes that plaintiff was terminated for reasons other than alcohol or prescription drugs. Although the evidence does indicate that defendants were aware, at least to some degree, that plaintiff had possible issues with alcohol or prescription drugs, there is simply no evidence to support plaintiff's assertion that defendants terminated him because of alcohol or drug abuse. To the contrary, defendants presented ample evidence that plaintiff was terminated for just cause irrespective of plaintiff's alcohol or drug abuse. In dismissing plaintiff's PWDCRA claim, the trial court stated that there was no "evidence (other than plaintiff's unsubstantiated belief) that he was terminated for alcohol and/or substance abuse."

Plaintiff argues that the trial court erred in granting summary disposition of his PWDCRA claim because there is a question of fact regarding whether defendants perceived him as having a problem with alcohol or drugs. Plaintiff also asserts that another disability at issue is pain he suffers as a result of bariatric surgery and injuries to his collar bone and pelvis. Plaintiff's argument regarding his pain being an actual or perceived disability is unclear; he does not argue how his pain constituted an actual or perceived disability. It is not enough for an appellant to simply announce a position or assert an error in a brief and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee, supra* at 406. To the extent that plaintiff has failed to adequately develop his argument regarding his pain being a disability or substantiate it with factual references to the record, this argument is abandoned, and we decline to address it.

The PWDCRA provides that an employer shall not "[d]ischarge or otherwise discriminate against an individual . . . because of a disability . . . that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b). "The plaintiff bears the burden of proving a violation of the PWDCRA." *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004). "'To prove a discrimination claim under the [PWDCRA], the plaintiff must show (1) that he is [disabled] as defined in the act, (2) that the [disability] is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute.'" *Peden*, *supra* at 204, quoting *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998). If the plaintiff establishes a prima facie case of purposeful discrimination, "'the burden shifts to the defendant to articulate a legitimate business reason for discharge.'" *Aho v Dep't of Corrections*, 263 Mich App 281, 289; 688 NW2d 104 (2004), quoting *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000). If the defendant articulates a legitimate business reason for discharging the plaintiff, the burden shifts back to the plaintiff "'to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge.'" *Aho*, *supra* at 289, quoting *Roulston*, *supra* at 281.

"Regardless of whether [a] plaintiff was actually disabled within the meaning of the PWDCRA, and even if [the] plaintiff no longer had any impairment at all at the time of the alleged discriminatory conduct," an employer can "be found to have violated subsection 103d of the PWDCRA if it discriminated against plaintiff on the basis of a perceived disability." *Chiles v*

Machine Shop, Inc, 238 Mich App 462, 475; 606 NW2d 398 (1999). As this Court explained in *Chiles*:

> Although [a perceived disability] claim may at first appear easier to establish because a plaintiff need not actually be disabled to fall within the PWDCRA, a plaintiff must still prove that the employer perceived that the employee was actually "disabled" within the meaning of the statute. In other words, showing that an employer thought that a plaintiff was somehow impaired is not enough; rather, a plaintiff must adduce evidence that a defendant regarded the plaintiff as having an impairment that substantially limited a major life activity—just as with an actual disability. Normally a *perceived* disability will be one that pertains to a disability with some kind of unusual stigma attached, often a mental disability, where negative perceptions are more likely to influence the actions of an employer. [*Id.* (citations omitted; emphasis in original).]
>
> To prevail on a perceived disability claim, the plaintiff must prove:
>
> (1) the plaintiff was regarded as having a determinable physical or mental characteristic; (2) the perceived characteristic was regarded as substantially limiting one or more of the plaintiff's major life activities; and (3) the perceived characteristic was regarded as being unrelated either to the plaintiff's ability to perform the duties of a particular job or position or to the plaintiff's qualifications for employment or promotion. [*Michalski v Bar-Levav*, 463 Mich 723, 732; 625 NW2d 754 (2001).]

There is ample evidence that defendants Palenick and Belleman may have regarded or perceived that plaintiff had a drug or alcohol problem. Even if defendants regarded or perceived plaintiff as having an alcohol or drug problem, however, with a perception of disability claim under the PWDCRA, "a plaintiff must still prove that the employer perceived that the employee was actually "disabled" within the meaning of the statute." *Chiles*, *supra* at 475. A "disability" is defined in MCL 37.1103(d)(*i*)(A) as "[a] determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic . . . substantially limits 1 or more of the major life activities[7] of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position . . . ." "'Unrelated to the individual's ability' means, with or without accommodation, an individual's disability does not prevent the individual from . . . performing the duties of a particular job or position." MCL 37.1103(*l*)(*i*).

Plaintiff cannot establish that defendants perceived him as being disabled for two reasons. First, even if defendants regarded plaintiff as having an alcohol or drug problem, drug use is not a disability under MCL 37.1103, and neither is alcohol use if it prevents the individual from doing his or her job. A disability does not include "[a] determinable physical or mental

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[7] Working is a major life activity. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 477; 606 NW2d 398 (1999).

characteristic caused by the current illegal use of a controlled substance by that individual"[8] or "[a] determinable physical or mental characteristic caused by the use of an alcoholic liquor by that individual, if that physical or mental characteristic prevents that individual from performing the duties of his or her job." MCL 37.1103(f)(*i*) and (*ii*). Thus, if the use of alcohol causes a plaintiff to be unable to do his or her job, it is not a disability under the PWDCRA. MCL 37.1103(f)(*ii*); see also *Chmielewski*, *supra* at 599.

Second, because of his own admissions regarding how the use of alcohol and prescription drugs affected his ability to work, plaintiff is unable to establish an issue of material fact regarding whether any perceived disability as a result of alcohol or drug abuse was regarded as being unrelated to plaintiff's ability to perform his duties as Director of the Department of Power and Technology. In his deposition, plaintiff himself admitted that use of alcohol and prescription drugs affected his ability to work. When asked if his drinking affected his performance for defendant city, he stated that "[i]t didn't do it any good . . . [b]ecause [drinking alcohol] has physiological effects on your biological operation. And, you know, if you go out and have several beers there is no way you can come in the next morning and be as sharp as you would if you had not gone out and had a few beers the night before." Plaintiff also discussed in his deposition how the pain medications he took impacted him at work:

> So I agreed to go to the pain clinic. And at the time I went to the pain clinic they were prescribing Vicodins. And then I got tired of taking them because they were dumbing me up. And I knew it was impacting me, you know, at work.
>
> So then they switched me over to the Duragesic pain patches. And then finally I said this has got to stop. This has got to stop. I just—You know, I have a job to do. I have pride in the work that I do. And this has got to stop. Is there something else that we can do?

Plaintiff specifically acknowledged that taking Vicodin and Oxycontin affected his job performance. When asked how the drugs affected his job performance, he responded: "Kind of like the same way of drinking several beers the night before and going to work the next morning. I'm not saying that it was a massive impact because it wasn't. But it was an impact."

Because plaintiff failed to establish a prima facie case of discrimination under the PWDCRA, the burden did not shift to defendants to articulate a legitimate, nondiscriminatory reason for terminating plaintiff. *Aho*, *supra* at 289. Nevertheless, as previously explained in detail, defendants have articulated numerous legitimate, nondiscriminatory reasons for terminating plaintiff, and plaintiff failed to establish an issue of fact that those reasons were mere pretext for discrimination. Therefore, the trial court properly granted summary disposition of plaintiff's PWDCRA claim.

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[8] Oxycontin and Fentanyl are both schedule 2 controlled substances, MCL 333.7214, and Vicodin is a schedule 3 controlled substance, MCL 333.7216.

D. Tort Claims

Plaintiff argues that the trial court erred in granting summary disposition of his tort claims against defendants based on governmental immunity.

The plain language of the governmental immunity statute expresses governmental immunity in the broadest possible language. *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 156; 615 NW2d 702 (2000); see also *Kruger v White Lake Twp*, 250 Mich App 622, 624; 648 NW2d 660 (2002). Under MCL 691.1407(1), "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." A "'[g]overnmental function' is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). "This definition is to be broadly applied." *Herman v Detroit*, 261 Mich App 141, 144; 680 NW2d 71 (2004). Whether an activity is a governmental function must focus on the general activity and not the specific conduct involved at the time of the tort. *Id.*

In addition, under MCL 691.1407(5), "the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons and damage to property if he or she is acting within the scope of his or her . . . executive authority." In *Marrocco v Randlett*, 431 Mich 700, 711; 433 NW2d 68 (1988), our Supreme Court outlined the factors to be considered in determining whether particular acts are within the scope of an individual's authority:

> The determination whether particular acts are within [a highest executive official's] authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government.

Plaintiff brought the following tort claims against defendants: defamation and invasion of privacy as to defendants city, Palenick and Belleman, tortious interference with a business relationship as to defendant Palenick and IIED as to all defendants. The trial court granted summary disposition of all of plaintiff's tort claims based on governmental immunity. The trial court also cited other bases for granting summary disposition of plaintiff's tort claims. Because summary disposition of all claims against defendants city, Palenick, and Belleman was proper based on governmental immunity, we need not address the alternative grounds for summary disposition cited by the trial court with respect to the defamation, invasion of privacy and tortious interference claims. However, because there was not a factual record developed for defendants Katt and Newton regarding governmental immunity, and because the trial court also granted summary disposition of plaintiff's IIED claim on the ground that the conduct was not sufficiently outrageous, we will address whether the trial court properly granted summary disposition of plaintiff's IIED claim as to defendants Katt and Newton based on the lack of a genuine issue of material fact regarding the outrageousness of their conduct.

Plaintiff's defamation claim against defendants city and Palenick was based on plaintiff's claim that defendant Palenick told city employees and employees of the Kerby-Bailey Detective Agency that he suspected that plaintiff was drinking on the job and was addicted to prescription

drugs. Plaintiff's defamation claim against defendants city and Belleman was based on eight ways in which Belleman accused plaintiff of breaching his employment responsibilities to the city, which plaintiff's complaint quoted directly from Belleman's November 2003 evaluation of plaintiff's job performance.

The city was immune from this tort claim, as well as plaintiff's remaining tort claims, under MCL 691.1407(1). "'Governmental agency' means the state or a political subdivision." MCL 691.1401(d). A political subdivision includes a "municipal corporation" like defendant city. MCL 691.1401(b). Furthermore, defendant city was engaged in the operation of its Department of Power and Technology, which is a governmental function. As stated above, a "'[g]overnmental function' is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). MCL 117.4f grants cities the power over franchises for electric light, heat and power and the power to contract "to purchase, operate, and maintain any existing public utility property for supplying water, heat, light, power, or transportation to the city and the city's inhabitants." In addition, MCL 117.4j(1) grants cities the power to establish any department necessary for the general welfare of the city, and MCL 117.4j(3) grants cities the power to exercise all municipal powers in the administration of the municipal government. These powers give the city the right to control light and power, utilities that are encompassed in defendant city's Department of Power and Technology. Thus, defendant city was engaged in the exercise of a governmental function and is immune from plaintiff's tort claims.

Although there was no factual development regarding whether the city manager is the "highest appointive executive official" of defendant city, plaintiff does not dispute that defendants Palenick and Belleman, as city managers, were the city's "highest appointive executive official" under MCL 691.1407(5). It appears from the evidence regarding the firing of defendant Palenick as city manager and the hiring of defendant Belleman as acting city manager that the city commission appoints the city manager. Article 5, § 5.2 of the city charter refers to the city manager as the city's "chief administrative officer." Given the fact that plaintiff does not dispute that defendants Palenick and Belleman, as city managers, are the "highest appointive executive official", this opinion assumes that the position of city manager does satisfy MCL 691.1407(5).

Whether defendants Palenick and Belleman are protected by governmental immunity depends on whether their conduct was ultra vires or whether their conduct was within the scope of their authority as city managers. The question regarding defendant Palenick is whether he acted within the scope of his authority in hiring a private investigator to conduct surveillance of plaintiff to determine if plaintiff was drinking alcohol or doing drugs on the job, and the question regarding defendant Belleman is whether he acted within the scope of his authority in allowing the surveillance initiated by defendant Palenick to continue and in making critical comments about plaintiff in his evaluation of plaintiff's job performance. Article 5, § 5.2 of the Bay City Charter outlines the powers and duties of the city manager. Under the city charter, the city manager is required to "direct and supervise the administration of all offices and departments of the city[,]" "[a]ppoint, discipline, suspend or terminate all city employees[,]"and "[m]anage and supervise all city utilities." Article 5, § 5.2.

Defendant Palenick explained in a deposition why he decided to have plaintiff investigated:

> In just watching the ongoing behaviors and performance of [plaintiff], I became rather concerned that perhaps he might have a problem or might be using either alcohol or some type of controlled substance. He had real difficulty holding thoughts. He slurred his speech at times, seemed to be unfocused, just a series of behaviors that we saw, we became rather concerned about.
>
> And as a result, also, some of the performance things that he was either doing or failing to do, we started to question if he had the background and the experiences that were told to us originally by the search firm.
>
> *So we sought out the investigation basically for two reasons. Number 1, to have them do a basic re-review of his employment, background, education, et cetera, because we had never done that ourselves; we relied on the professional search firm. We wanted to confirm that all those things were accurate.*
>
> And then Number 2, to perhaps do some limited investigation and/or surveillance of him, just to see if it appears that, during work hours, he might be doing things that were inappropriate, particularly with alcohol and/or some other controlled substance.

Defendant Palenick's authority, as outlined in the city charter, requires the city manager to supervise the administration of all city departments and supervise all city utilities, as well as to appoint, discipline, suspend or terminate all city employees. While the charter does not explicitly authorize the city manager to hire an investigator to conduct surveillance on a city employee who is not performing well or who the city manager suspects is using drugs or alcohol on the job, such explicit authorization is not necessary. An activity is a governmental function if it is "expressly *or impliedly* mandated or authorized by constitution, statute, local charter ordinance, or other law." MCL 691.1401(f) (emphasis added). The city charter impliedly authorizes the city manager to conduct the surveillance of employees in exercising the city manager's duty to appoint, discipline, suspend or terminate all city employees. In order to appoint a director for the Department of Power and Technology, it is necessary for the city manager to have information regarding the employee's background, education and experience. In order to determine whether disciplinary action, suspension or termination of a city employee is appropriate and necessary, it may be necessary to obtain information regarding whether the employee has an alcohol or drug problem if the city manager suspects such a problem.

Furthermore, the specific manner in which the governmental actor exercises its authority is not the issue in determining whether such conduct is a governmental function. *Herman, supra* at 144. Plaintiff's argument that defendants Palenick and Belleman were not authorized to hire an investigator to perform surveillance of him improperly focuses on the specific conduct, rather than the general activity involved. Defendant Palenick's conduct was related to his general duties to supervise city departments and utilities and to appoint, discipline, suspend or terminate all city employees, and defendant Belleman's continuation of the surveillance was related to the same duties. Thus, defendants Palenick and Belleman were authorized to hire an investigator to conduct surveillance of plaintiff. Such conduct was not outside the scope of the city manager's authority.

Similarly, the city manager's authority to "[a]ppoint, discipline, suspend or terminate all city employees" also impliedly includes authorization for the city manager to conduct performance evaluations of city employees. All of the defamation allegations against defendant Belleman are quotes from Belleman's evaluation of plaintiff's work performance. Defendant Belleman clearly acted within the scope of his authority as city manager in performing and writing the evaluation of plaintiff's job performance, and the trial court properly granted summary disposition of this claim based on governmental immunity.

Plaintiff's invasion of privacy and tortious interference with a business relationship claims were also based on Palenick's employment of the investigator to conduct surveillance of plaintiff and Belleman's continuation of the surveillance. For the reasons articulated above, defendants were shielded from this claim by governmental immunity, and the trial court properly granted summary disposition of these claims.

Plaintiff's IIED claim was against all defendants. The claim does not specifically state what actions of defendants, Palenick, Belleman, Katt and city was extreme and outrageous, but generally alleges that Palenick and Belleman's conduct, "as outlined above," was extreme and outrageous. The conduct referred to by plaintiff presumably includes defendants Palenick and Belleman's alleged defamatory statements regarding plaintiff's use of alcohol and drugs as well as their conduct of hiring a private investigator to conduct surveillance of plaintiff. The complaint alleges that defendant Katt "engaged in a purposeful and vindictive course of behavior to bring about the Plaintiff's termination and loss of Plaintiff's valuable interest in employment" and that the conduct of defendants Newton and Katt was "retaliatory in nature and, in fact, led to the termination of Plaintiff" and that they "encouraged Belleman in the termination of Plaintiff . . . ." The only specific allegations in the IIED claim itself relate to defendant Newton. According to the claim, Newton wrote a list of plaintiff's omissions and commissions regarding plaintiff's job performance, which included a claim that plaintiff had lied to the city commission, and shared this list with other employees of defendant city, including plaintiff's immediate supervisor. According to the IIED claim, defendant Newton knew or should have known that some of his allegations were false or inaccurate, and his actions "were intended to bring about the termination of Plaintiff."

To the extent that the IIED claim is based on defendants Palenick and Belleman's statements about plaintiff's use of alcohol or drugs and hiring of an investigator to conduct surveillance of plaintiff, that conduct is within the scope of the city manager's authority, and summary disposition of the IIED claim against those defendants is proper based on governmental immunity. As previously noted, however, there was not a factual record developed for defendants Katt and Newton regarding governmental immunity. Thus, we examine whether the trial court properly granted summary disposition of plaintiff's IIED claim as to defendants Katt and Newton based on the lack of a genuine issue of material fact regarding the outrageousness of their conduct.

To establish an IIED claim, plaintiff "must show (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Frohriep v Flanagan (On Remand)*, 278 Mich App 665, 683; 754 NW2d 912 (2008). "'Liability attaches only when a plaintiff can demonstrate that the defendant's conduct is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'" *Id*. (quotation omitted). "It is for

the trial court to initially determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery[,]" but if reasonable individuals can differ, "it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004).

Plaintiff has not alleged any conduct on the part of defendants Katt and Newton that is so extreme that it goes beyond all possible bounds of decency and is atrocious and utterly intolerable in a civilized society. *Frohriep*, *supra* at 683. If defendants Katts and Newton did engage in purposeful and vindictive behavior by attempting to get plaintiff fired and encouraging defendant Belleman to fire him, such conduct as generally alleged by plaintiff is not extreme and outrageous. Furthermore, defendant Newton's alleged conduct of writing a list of plaintiff's failings in his job, some of which plaintiff alleges was false or inaccurate, and sharing the list with other city employees, also was not extreme and outrageous. Thus, the trial court properly granted summary disposition of plaintiff's IIED claim as to defendants Katts and Newton.

Plaintiff argues that governmental immunity does not shield defendants from liability because supplying power to the city's residents for money constitutes a proprietary function. There is an exception to governmental immunity when an agency is engaged in proprietary functions:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. . . . [MCL 691.1413.]

The exception applies to governmental agencies, not individuals. With the exception of defendant city, the defendants in this case are all individuals. Furthermore, as the statutory language indicates, the exception only applies to "actions to recover for bodily injury or property damage arising out of the performance of a proprietary function[.]" MCL 691.1413. In this case, plaintiff was not seeking to recover for bodily injury or property damage as a result of defendants' alleged tortious conduct; therefore, the proprietary function exception does not apply. Furthermore, plaintiff failed to plead in avoidance of governmental immunity. "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental of proprietary function." *Mack v Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002). Plaintiff did not plead facts demonstrating that the alleged torts occurred during the discharge of a proprietary function. Finally, whether the proprietary function exception applies is not preserved for appeal because the trial court failed to address it. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Plaintiff also argues that defendant Belleman's conduct was outside the scope of his authority because it was in bad faith. This argument is without merit. In *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997), our Supreme Court noted that there is not an intent exception to governmental immunity. The Supreme Court stated:

> The Legislature's grant of immunity in MCL 691.1407(5); MSA 3.996(107)(5) is written with utter clarity. We need not reach the concern that a malevolent-heart exception might not be workable, since the Legislature has provided no such test.
>
> This Court's *Marrocco* opinion does not explicitly adopt an intent exception to governmental immunity, noting that a variety of factors must be considered to determine whether an official is acting with the scope of "executive authority." 431 Mich 711. This Court did not include "motive" in that roster of considerations . . . . [*American Transmissions*, *supra* at 143.]

Under *American Transmissions*, defendant Belleman's motive or intent is immaterial to the issue of governmental immunity under MCL 691.1407(5). Thus, plaintiff's argument in this regard is unavailing.

E. Other Issues

Plaintiff argues that the trial court erred in denying his motion for summary disposition regarding the facts that he never drank alcohol during work hours and that prescribed medication did not affect his work.

To preclude summary disposition based on the lack of a material factual dispute, a disputed factual issue must be material to the dispositive legal claims. *Martin v Ledingham*, 282 Mich App 158, 161; ___ NW2d ___ (2009). In this case, whether plaintiff drank alcohol during working hours is arguably material to plaintiff's defamation claim against defendant Palenick because plaintiff claims that Palenick told others that plaintiff was drinking on the job. This fact is also arguably relevant to plaintiff's breach of contract, wrongful termination and PWDCRA claims, inasmuch as plaintiff asserts that his use of alcohol was the reason his employment was terminated. Defendants do not claim that plaintiff was terminated for drinking alcohol, let alone for drinking alcohol during working hours. Irrespective of the absence of evidence that plaintiff drank alcohol on the job, summary disposition of plaintiff's defamation claim against defendant Palenick was proper based on governmental immunity. Furthermore, his claims of breach of contract, wrongful termination and violation of the PWDCRA were properly dismissed because defendants offered substantial evidence that plaintiff was terminated for just cause, and plaintiff was unable to counter this evidence. The absence of evidence that plaintiff drank during work hours does not diminish the ample documentary evidence that plaintiff was terminated for just cause. With or without evidence that plaintiff drank alcohol during working hours, plaintiff was unable to establish an issue of fact regarding whether he was terminated for alcohol abuse. Thus, any error in this regard was harmless.

Whether plaintiff's use of prescription medication affected his work performance is material to plaintiff's breach of contract, wrongful termination and PWDCRA claims to the extent that plaintiff's use of such medication affected his work to the point that he was terminated for poor performance. However, plaintiff's own statements during his deposition establish an issue of fact regarding whether his use of prescription drugs affected his work performance. He stated that he got tired of taking Vicodin because it was "dumbing me up" and "impacting me . . . at work." He further admitted that Vicodin and Oxycontin affected his job performance "[k]ind of like the same way of drinking several beers the night before and going to work the next morning. I'm not saying that it was a massive impact because it wasn't. But it

was an impact." Therefore, the trial court properly denied plaintiff's motion for summary disposition.

V. Conclusion

The trial court properly dismissed plaintiff's state law claims. Furthermore, the trial court properly dismissed Elizabeth Dean's loss of consortium claim, which is a derivative action, *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 163 n 1; 713 NW2d 717 (2006), because all of plaintiff's primary claims, including both tort and other claims, were dismissed. *Long v Chelsea Community Hosp*, 219 Mich App 578, 589; 557 NW2d 157 (1996) ("A derivative claim for loss of consortium stands or falls with the primary claims in the complaint.") We need not address plaintiff's arguments regarding the trial court's rulings on his motions in limine in light of our resolution of plaintiff's remaining arguments on appeal.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Michael J. Kelly